BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AMY R. PARKER ROUSE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,045,048
LARNED HEALTHCARE CENTER	)	
Respondent	)	
AND	)	
	)	
PREMIER GROUP INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The parties appealed the August 2, 2011, Award entered by Administrative Law Judge (ALJ) Bruce E. Moore. The Workers Compensation Board heard oral argument on October 21, 2011. The Director appointed E. L. Lee Kinch of Wichita, Kansas, to serve as a Board Member Pro Tem in this matter in place of former Board Member Julie Sample. As of October 31, 2011, Ms. Sample has been replaced on the Board by Mr. Gary R. Terrill. However, due to a conflict, Mr. Terrill has recused himself from this appeal. Accordingly, Mr. Kinch will continue to serve as a Board Member Pro Tem in this case.

APPEARANCES

John L. Carmichael of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, the parties agreed all of the preliminary hearing exhibits except the medical records of Dr. C. Reiff Brown should be made part of the record.

ISSUES

This is a claim for a March 4, 2009, accident. ALJ Moore determined the following in the August 2, 2011, Award: (1) claimant sustained her burden of proving she suffered

a personal injury by accident arising out of and in the course of her employment; (2) claimant sustained a 5% whole body functional impairment; (3) claimant sustained a 41% task loss and a 100% wage loss yielding a 70.5% work disability;[1] and (4) claimant failed to prove her entitlement to temporary total disability benefits. With regard to claimant's wage loss, ALJ Moore found claimant was not earning any income or realizing any economic benefit by providing care for her child and stepchildren. The ALJ awarded claimant permanent disability benefits ultimately based upon the average of her 100% wage loss and 41% task loss for a 70.5% work disability. The Award does not specifically address an award of future medical benefits.

Respondent asserts that claimant should be denied compensation. It argues claimant failed to sustain her burden of proving she suffered a compensable injury. Respondent questions claimant's veracity. In its reply brief, respondent asserts claimant testified she injured herself while bending down to pick up an item, but told a treating physician the injury occurred while lifting a patient.

If the Board determines that claimant has a compensable injury, respondent submits claimant should be limited to an award based only upon a 5% whole body functional impairment. Respondent maintains that claimant is not eligible to receive a work disability award as claimant is receiving a financial benefit by providing care for her child and stepchildren, the weekly value of which is greater than her preinjury average weekly wage. Respondent also contends the credible evidence establishes that claimant has not sustained a task loss. In its reply brief respondent asserts that claimant failed to request an award of future medical benefits at the regular hearing.

Claimant maintains that she: (1) sustained injury by accident arising out of and in the course of her employment; (2) sustained an 8% whole body functional impairment; (3) is entitled to a work disability and the award for a 70.5% work disability should be affirmed; (4) is entitled to temporary total disability benefits from March 26, 2009, through June 23, 2010; and (5) is entitled to an award of future medical benefits upon proper application to the Director of the Division of Workers Compensation as provided by the Workers Compensation Act as it existed on her date of accident, March 4, 2009.

In her Application for Hearing filed on April 6, 2009, and amended Application for Hearing filed on August 25, 2009, claimant alleges suffering a back and bilateral leg injury on March 4, 2009, and every working day thereafter. The cause of the accident was listed as transferring a resident. At the regular hearing, claimant withdrew her claim for a series

[1] A work disability is a permanent partial disability under K.S.A. 44-510e that is greater than the whole body functional impairment rating.

of repetitive traumas and alleged a single traumatic injury on March 4, 2009. Respondent accepted claimant's withdrawal of the repetitive series claim.[2]

Respondent's issues on appeal are as follows:

1. Did claimant's injuries arise out of and in the course of her employment with respondent?

2. If so, what is the nature and extent of claimant's disability?

2a. What is claimant's permanent functional impairment?

2b. What is claimant's wage loss?

2c. What is claimant's task loss?

Claimant's issues on appeal are as follows:

1. Is claimant entitled to temporary total disability (TTD) benefits from March 26, 2009, through June 23, 2010?

2. Is claimant entitled to an award of future medical benefits upon proper application to and approval by the Director of the Division of Workers Compensation?

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Claimant went to work for respondent as a CNA on January 26, 2009. On March 4, 2009, claimant alleges she was injured while transferring a patent. Her testimony was: "I was transferring a patient into bed and afterwards, I bent down to pick up something and I just had a sharp pain in the right side of my lower back that shot down my right leg."[3] There were no witnesses to the incident other than the patient. Claimant testified that she pretended not to be hurt so the patient would not know. She then walked out and told a nurse of the injury and the incident was written up in a report.[4]

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[2] R.H. Trans. at 10-11.

[3] P.H. Trans. at 12.

[4] R.H. Trans. at 39.

Respondent sent claimant to see Dr. David Sanger. Claimant complained to Dr. Sanger of right low back pain. He saw claimant on March 5, 2009. He ordered x-rays of the lumbar spine and prescribed Flexeril. The x-ray was normal. On March 9, 2009, Dr. Sanger ordered an MRI. Dr. Sanger imposed a temporary restriction of not lifting more than 10 pounds. On March 16, 2009, Dr. Sanger again saw claimant. His note from that visit indicates claimant was making a minimal effort to move her legs against resistance and the strength she showed would not enable her to hold her body or walk. Dr. Sanger reviewed the MRI with claimant and determined it was normal. He prescribed two weeks of physical therapy and released claimant to work without restrictions.

After being released by Dr. Sanger, claimant returned to her normal work duties the following Monday. She testified that lifting patients caused back pain. Claimant told her supervisor about having difficulty lifting. The supervisor told claimant she needed to decide if she could do the lifting. On March 26, 2009, claimant quit her job because the lifting was causing her to have back pain.

Following a pre-trial conference on June 3, 2009, the ALJ issued an order requiring respondent to provide the names of three physicians from which claimant would designate a treating physician. Claimant chose Dr. David W. Hufford, a fellow of the American Academy of Family Physicians. Claimant first saw Dr. Hufford on June 29, 2009. He diagnosed claimant with a back strain and recommended she resume physical therapy for four weeks.

Dr. Hufford also gave claimant temporary restrictions of not lifting more than 20 pounds, lifting 11 to 20 pounds occasionally and frequent lifting of 10 pounds or less. He also restricted claimant to occasional bending, twisting and turning; not pushing or pulling more than 25 pounds and pushing and pulling 25 pounds or less on an occasional basis. Dr. Hufford testified: "When she [claimant] first presented to me on June 29th of 2009, she had not had complete treatment."[5] He indicated the temporary restrictions were necessary until claimant's treatment could be completed. On July 29, 2009, claimant informed Dr. Hufford that she was pregnant. He advised her to avoid epidural injections, electrical stimulation and ultrasound. He continued claimant's restrictions.

At the September 10, 2009, preliminary hearing, a video surveillance DVD of claimant was introduced. At the preliminary hearing, claimant was asked about the video. She admitted that on two occasions she picked up a child that weighed between 30 and 35 pounds, which exceeded her restrictions. The video was taken on August 26 and 27, 2009.

Rebecca Scripsick, director of nursing for respondent, testified that when Dr. Sanger imposed temporary restrictions, respondent provided claimant accommodated

[5] Hufford Depo. at 20.

employment. She said that after Dr. Hufford imposed restrictions on June 29, 2009, claimant never asked to return to work and respondent never offered accommodated work. On June 30, 2009, respondent's counsel made Ms. Scripsick aware of the restrictions Dr. Hufford gave claimant. Ms. Scripsick indicated she was unaware claimant's attorney sent a letter to respondent's attorney on July 7, 2009, asking respondent to return claimant to accommodated work.

Ms. Scripsick testified at the preliminary hearing that respondent had accommodated work available within Dr. Hufford's restrictions for claimant at her preinjury wage. She testified there was a job available on the 6:00 a.m. to 2:00 p.m. shift. Claimant could show up at 6:00 a.m. the next morning and begin working. The ALJ specifically queried Ms. Scripsick about the job offer so there would be no "snafus *[sic]*."[6] At the regular hearing claimant testified she reported to work the following Monday at 9:00 a.m. for orientation.

Claimant testified that after orientation, she discussed her employment with Ms. Scripsick. Claimant was informed she would have to work the graveyard shift (10:00 p.m. to 6:00 a.m.). Claimant consulted with her husband and informed Ms. Scripsick that she could not work the graveyard shift because her husband's job required him to be on call during the night.

On August 24, 2009, Dr. Hufford saw claimant and prescribed physical therapy. He continued claimant's temporary restrictions. On September 9, 2009, Dr. Hufford wrote a letter to respondent's counsel stating the restrictions which he imposed should allow claimant to continue her duties with accommodation as a nursing assistant and that he never advised her to cease working. Dr. Hufford continued to see claimant on an ongoing basis. He prescribed home exercise, heat and Tylenol. Dr. Hufford removed claimant's restrictions on May 10, 2010. On June 23, 2010, Dr. Hufford indicated claimant reached MMI and had no permanent restrictions. His final diagnosis was a work-related myofascial lumbar strain.

As a result of claimant's lumbar strain, Dr. Hufford opined that in accordance with the AMA *Guides*,[7] claimant had a 5% permanent functional impairment to the body as a whole. Dr. Hufford opined claimant had no permanent restrictions and was not asked to give an opinion on task loss. However, as to restrictions, the following testimony is relevant:

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[6] P.H. Trans. at 59-60.

[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

> Q. (Mr. Carmichael) I guess long story made short, you talked to her [claimant] about it, she indicated she would really rather not have lifetime restrictions imposed, you suggested that she look for employment in an area that would not cause her to excessively lift, stoop, twist and bend, and left it to her own tolerance, if you will, to limit her own activities appropriately. Would that be a fair summary of the situation?
>
> A. (Dr. Hufford) I think that is a fair characterization.[8]

At the request of her counsel, claimant saw Dr. George G. Fluter, who is board certified in physical medicine and rehabilitation, on July 26, 2010. Dr. Fluter obtained a medical history from claimant, reviewed the medical records of Dr. Hufford, and physically examined claimant. Claimant complained to Dr. Fluter of lower back pain that occasionally progressed into the legs.

Dr. Fluter's assessment of claimant was:

1. Status post work-related injury; 03/04/09.
2. Low back/right lower extremity pain.
3. Lumbosacral strain/sprain.
4. Probable right lower extremity radiculitis.
5. Myofascial pain affecting the lower back.
6. Bilateral sacroiliac joint dysfunction.
7. Left trochanteric bursitis.[9]

Dr. Fluter opined there was a causal relationship between claimant's current condition and the reported injury of March 4, 2009. He testified claimant suffered an initial injury on March 4, 2009, and then aggravated or exacerbated the condition when she performed her work duties after returning to work. He gave claimant a 5% permanent impairment to the body as a whole as a result of myofascial pain in the lower back and placed her in DRE Lumbosacral Spine Impairment Category II. He opined claimant had a 1% permanent impairment to the body as a whole for right-sided sacroiliac joint dysfunction, a 1% permanent impairment to the body as a whole for left-sided sacroiliac joint dysfunction, and a 1% permanent impairment to the body as a whole for trochanteric bursitis, but without an abnormal gait. Using the Combined Values Chart in the *Guides,* Dr. Fluter opined claimant has a permanent partial impairment to the body as a whole of 8%.

Dr. Fluter restricted claimant's lifting, carrying, pushing and pulling to 35 pounds occasionally and 15 pounds frequently (physical demand level between light and medium) and restricted bending, stooping, crouching and twisting to occasional. He testified the

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[8] Hufford Depo. at 28-29.

[9] Fluter Depo., Ex. 2 at 4.

restrictions were a result of claimant's initial injury on March 4, 2009. Dr. Fluter reviewed 32 non-duplicative job tasks that claimant performed in the 15 years prior to the accident. The job tasks were identified by personnel consultant Jerry D. Hardin, who interviewed claimant and reviewed Dr. Fluter's report. Dr. Fluter opined claimant could no longer perform 13 of the 32 non-duplicative job tasks for a 41% task loss.

Respondent's counsel and Dr. Fluter sparred over his finding that claimant suffered a 1% permanent impairment for right sacroiliac joint dysfunction and a 1% permanent impairment for left sacroiliac joint dysfunction. The *Guides* contains a section related to pelvic fractures (sacroiliac joint). That section provides for a permanent impairment where an injured person suffers a fracture of the sacroiliac joint. Dr. Fluter testified the impairment for a fractured sacroiliac joint is 10%. Because claimant did not suffer a pelvic fracture, and the *Guides* does not address claimant's situation, Dr. Fluter assigned claimant the 1% permanent impairments.

On November 16, 2010, the ALJ ordered Dr. Terrence Pratt to conduct an independent medical examination of claimant and to provide an opinion as to diagnosis, permanent impairment and restrictions. Dr. Pratt examined claimant on January 25, 2011. Pursuant to an order from the ALJ he reviewed the video surveillance DVD and the preliminary hearing transcript. He also reviewed medical records of Dr. Sanger, Dr. C. Reiff Brown, Dr. Hufford, Dr. Fluter and the MRI report. He assigned claimant a 5% permanent impairment to the body as a whole for involvement of the lumbosacral region and placed her in DRE Category II. He recommended restrictions of no lifting in excess of 50 pounds occasionally, 25 pounds more frequently, and avoid pushing or pulling in excess of 100 pounds. Dr. Pratt was not deposed. He was not asked, nor did he give, an opinion concerning claimant's task loss.

At the regular hearing, respondent's counsel inquired about claimant's current work status. Claimant testified she was caring for her own child, age 1, and three stepchildren, ages 6 through 8. Claimant stated that she was not paid to care for the children. If she was unable to care for the children, a family member would care for them. Claimant acknowledged the tasks she performed in caring for the children are the same as when she worked as a babysitter.

Respondent took the deposition of vocational rehabilitation counselor Dan R. Zumalt. He testified the value of providing care for the four children was $447.93 per week.[10] Mr. Zumalt acknowledged that in the family setting, the services of cleaning, cooking and providing childcare are not provided in the open labor market. Instead those services are provided within the home so the services do not have to be purchased. Mr. Zumalt did not interview claimant to determine the exact nature of the services she was providing the children or the hours that she was providing care for them.

[10] Zumalt Depo. at 6.

Claimant's vocational expert, Jerry D. Hardin, testified that a worker cannot have a task loss unless he or she has permanent restrictions.[11] He opined that if a person watches their children or children by a marriage, it does not constitute substantial, gainful employment. He testified that no employer in the open labor market pays a person to watch their own children.

The ALJ determined claimant suffered a personal injury by accident arising out of and in the course of her employment with respondent. He then determined that claimant had a 5% permanent functional impairment to the body as a whole. The ALJ disallowed Dr. Fluter's impairment ratings for the right and left sacroiliac joint dysfunction because Dr. Fluter relied on the section of the *Guides* that pertains to pelvic fractures. He also discounted Dr. Fluter's opinion that claimant suffered a permanent impairment for trochanteric bursitis. The ALJ did so because claimant has a normal gait, but Dr. Fluter utilized a section of the *Guides* that dealt with bursitis causing an altered gait. The ALJ did not indicate that Dr. Fluter's diagnoses of claimant were not credible or were incorrect.

At the regular hearing, claimant's counsel did not request that claimant be awarded future medical treatment. Nor did claimant's counsel address this issue in his submission letter to the ALJ.

The ALJ denied claimant's request for TTD benefits from March 26, 2009, through June 23, 2010. He reasoned claimant was not under any temporary restrictions from March 26, 2009, to June 29, 2009, and chose to voluntarily quit her job. The ALJ denied claimant TTD benefits from June 29, 2009 through June 23, 2010, because Dr. Hufford opined that claimant was capable of working within her restrictions. Claimant chose not to work the graveyard shift and quit voluntarily.

Because Dr. Fluter was the only physician to testify as to claimant's task loss, the ALJ adopted Dr. Fluter's opinion that claimant suffered a 41% task loss. Although respondent argued that by providing childcare for her children and stepchildren claimant was earning 90% or more of her preinjury wage, the ALJ found claimant had a 100% wage loss. Accordingly, the ALJ found that claimant had a 70.5% work disability. The ALJ was silent on the issue of future medical benefits.

PRINCIPLES OF LAW

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.[12] A

[11] Hardin Depo. at 25-26.

[12] K.S.A. 2008 Supp. 44-501(a), *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

claimant must establish that his or her personal injury was caused by an "accident arising out of and in the course of employment."[13] The phrase "arising out of" employment requires some causal connection between the injury and the employment.[14] The existence, nature and extent of the disability of an injured workman is a question of fact.[15] A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.[16] The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.[17]

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination.[18] Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability.[19]

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[20] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[21]

K.S.A.44-510e(a) in part states:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

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[13] K.S.A. 2008 Supp. 44-501(a).

[14] *Pinkston v. Rice Motor Co.*, 180 Kan. 295, 303 P.2d 197 (1956).

[15] *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

[16] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[17] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987).

[18] *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

[19] *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

[20] K.S.A. 2008 Supp. 44-501(a).

[21] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

K.S.A. 2008 Supp. 44-511(a)(2) states:

(2) The term "additional compensation" shall include and mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system. Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.

K.S.A. 44-510c(b)(2) provides:

(2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment. A release issued by a health care provider with temporary medical limitations for an employee may or may not be determinative of the employee's actual ability to be engaged in any type of substantial and gainful employment, except that temporary total disability compensation shall not be awarded unless the opinion of the authorized treating health care provider is shown to be based on an assessment of the employee's actual job duties with the employer, with or without accommodation.

K.S.A. 2008 Supp. 44-510h(a) in part states:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director, in the director's discretion, so orders . . . .

ANALYSIS

The Board concludes claimant suffered a back injury that arose out of and in the course of her employment with respondent. Claimant has consistently maintained that her injury happened when she was transferring a patient into a bed and then afterwards she bent over to pick up something and felt pain in her lower back. Following the injury, she immediately notified a nurse of the accident. The fact that a notation in Dr. Sanger's report states that claimant injured herself while lifting a patient is evidence that supports claimant's contention that her injury was work related. Further, Drs. Hufford and Fluter opined the injury was work related.

Drs. Hufford and Fluter gave claimant a 5% permanent functional impairment to the body as a whole and placed claimant in DRE Lumbosacral Spine Impairment Category II resulting from myofascial pain. Dr. Pratt indicated claimant would have DRE Category II involvement for the lumbosacral region or a 5% permanent partial impairment of the whole body. Dr. Fluter gave claimant additional 1% permanent impairments to the body as a whole for left and right sacroiliac joint dysfunction and a 1% permanent impairment to the body as a whole for trochanteric bursitis.

The ALJ determined that Dr. Fluter's finding that claimant has 1% permanent impairments to the body as a whole for left and right sacroiliac joint dysfunction and a 1% permanent impairment to the body as a whole for trochanteric bursitis is not in accordance with the *Guides*. The *Guides* only allows for an impairment rating for an injury to the sacroiliac joint where an individual has suffered a pelvic fracture. Furthermore, the section of the *Guides* that Dr. Fluter relied upon to give a permanent impairment for the trochanteric bursitis requires the patient to have an altered or antalgic gait. Claimant had neither a broken pelvis nor an antalgic gait.

The ALJ found claimant had a 5% permanent impairment to the body as a whole. He discounted Dr. Fluter's opinion that claimant suffered permanent impairment for left and right sacroiliac joint dysfunction and trochanteric bursitis. The ALJ did not dispute Dr. Fluter's diagnoses of left and right sacroiliac joint dysfunction and trochanteric bursitis. Rather, the ALJ determined Dr. Fluter's impairment ratings for those conditions were not in accordance with the *Guides*. Accordingly, the Board affirms the ALJ's finding that claimant has a 5% permanent functional impairment to the body as a whole.

Respondent argues that because claimant is caring for her child and her three stepchildren that she is ineligible to recover a work disability because she is engaged in work for wages equal to 90% or more of her average gross weekly wage. Respondent contends claimant is receiving "additional compensation" pursuant to K.S.A. 2008 Supp. 44-511(a)(2). The respondent's expert, Dan R. Zumalt, testified that the value of claimant watching the four children is $447.93 per week, which is more than 90% of claimant's wage at the time she was injured. The Board categorically rejects the argument of respondent.

Respondent's argument that claimant is now earning 90% or more of her preinjury wage is rejected. K.S.A. 44-510e(a) contains the term "any work for wages." Claimant is not earning any wages when caring for her children. K.S.A. 2008 Supp. 44-511(a)(2) contemplates that "additional compensation" is compensation an employee receives from an employer. Here, claimant is not receiving compensation from an employer for caring for her children. Mr. Zumalt testified that claimant is receiving an economic gain by caring for her child and stepchildren. The economic gain claimant receives is the money she saves by not paying for childcare. Economic gain is not the same as earning wages from an employer. Therefore, the Board finds that claimant is not engaged in work for wages when caring for her children.

Adopting respondent's argument that watching one's child and/or stepchildren is working for wages would have significant ramifications that are contrary to public policy. Many workers with numerous restrictions and a resulting significant task loss would be precluded from receiving permanent partial general disability benefits solely because, following an injury, they decided to care for their children and/or stepchildren. The worker would be placed in a position of making choices that would have an adverse effect on his or her family. Vocational experts would be placed in the position of valuing each task a worker performed in his or her home such as cleaning, cooking, doing laundry, mowing the yard, etc. The Board finds that claimant is not working for wages pursuant to K.S.A. 44-510e(a) nor is she receiving "additional compensation" pursuant to K.S.A. 2008 Supp. 44-511(a)(2).

Respondent asserts that once Dr. Hufford testified claimant has no restrictions, it is unnecessary to elicit testimony from him concerning task loss. When an injured employee has no restrictions, he or she can have no task loss. Claimant counters with several arguments. First, Dr. Hufford did give restrictions, albeit, not specific restrictions. Second, respondent's expert Dr. Hufford failed to testify concerning task loss. Third, Dr. Pratt imposed upon claimant significant restrictions. Fourth, Dr. Fluter is the only physician who testified as to task loss and, therefore, his testimony is uncontroverted. The ALJ found that respondent failed to ask Dr. Hufford about claimant's task loss and that Dr. Fluter's testimony was uncontroverted.

In order for a worker to have a task loss, he or she must have restrictions imposed by a physician. Dr. Hufford did not delineate specific restrictions, but he did suggest that claimant look for employment in an area that would not cause her to excessively lift, stoop, twist and bend, and left it to her own tolerance to limit her own activities appropriately. In essence, Dr. Hufford gave claimant general nonspecific work restrictions. These restrictions would preclude claimant from engaging in many jobs available in the open labor market. In the present case, Drs. Pratt, Fluter and Hufford gave claimant permanent restrictions.

Respondent contends that Dr. Fluter's task loss opinion is inaccurate, because it is based in part on his belief claimant suffered permanent impairments for the left and right

sacroiliac joints and trochanteric bursitis. A physician may impose upon an injured worker permanent restrictions as a result of a work-related injury, even when the *Guides* does not allow for an impairment for that worker's condition. The Kansas Court of Appeals has ruled in *McLaughlin*[22] that even though the physicians determined McLaughlin had no functional impairment, they testified he could not return to work. Therefore, McLaughlin suffered a work disability. In *Hanson*,[23] the Court made a clear distinction between functional impairment and work disability. In *Gustin*,[24] the Kansas Court of Appeals determined Gustin suffered a task loss, where the physicians who examined Gustin opined Gustin was physically capable of performing certain tasks. However, the physicians recommended Gustin not perform the tasks, because to do so would cause pain and reinjury. Although the *Guides* provided for no permanent functional impairment for claimant's sacroiliac joint dysfunction and trochanteric bursitis, claimant was given permanent restrictions by Dr. Fluter. Therefore, the Board affirms the ALJ's finding that claimant suffered a 41% task loss and a 100% wage loss, which results in a work disability of 70.5%.

Claimant alleges she should receive TTD benefits from March 26, 2009, when she quit working, until June 23, 2010, when claimant reached MMI. Claimant argues Dr. Sanger inappropriately lifted claimant's temporary work restrictions. From March 26, 2009, to June 29, 2009, claimant was under no temporary restrictions. Knowing this, claimant chose to voluntarily quit her job. Therefore, the Board finds that claimant is not entitled to TTD benefits for the period from March 26, 2009, to June 29, 2009.

Dr. Hufford imposed temporary restrictions upon claimant on June 29, 2009. On June 30, 2009, respondent became aware of claimant's temporary restrictions, but did not offer claimant accommodated work. At the preliminary hearing, respondent offered a job to claimant on the 6:00 a.m. to 2:00 p.m. shift. The ALJ did not want problems so he made sure this was agreeable with both claimant and respondent. When claimant showed up to work and completed her orientation, respondent indicated that claimant would be required to work the graveyard shift, the only shift she could not work. Because respondent did not keep its agreement, the Board finds that claimant is entitled to TTD benefits from June 29, 2009, through June 23, 2010, the date claimant reached MMI.

The final issue to be considered by the Board is whether claimant is entitled to future medical benefits upon proper application. Respondent asserts claimant waived her right to future medical treatment because, at the regular hearing, her attorney did not indicate future medical benefits were an issue. Nevertheless, K.S.A. 2008 Supp.

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[22] *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 44, 783 P.2d 348, *rev. denied* 245 Kan. 784 (1989).

[23] *Hanson v. Logan U.S.D. 326*, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

[24] *Gustin v. Payless ShoeSource, Inc.*, 46 Kan. App. 2d 87, 257 P.3d 1277 (2011).

44-510h(a) requires an employer to provide an injured employee the services of a health care provider.

In *Lane*[25] the Board declared: "Medical compensation is one of the most important rights under the Workers Compensation Act. The Act requires an employer to provide an injured worker with the medical treatment that is reasonable and necessary to cure and relieve the injured worker from the effects of the injury." The Board went on to state: "Without being able to foretell the future, the Board has grave reservations in general about terminating a worker's right to seek additional medical treatment."[26] One of the basic tenets of the Kansas Workers Compensation Act is that a worker injured in a work-related accident be provided adequate medical treatment. In *Ferrell*[27] and *Boucher*,[28] the Courts found that where there is no evidence of a continued need for medical treatment a claimant retains the right to future medical treatment upon proper application to the Director of the Division of Workers Compensation. Accordingly, the Board concludes claimant is entitled to future medical benefits upon proper application to and approval by the Director of the Division of Workers Compensation.

CONCLUSION

1. Claimant's back injury arose out of and in the course of her employment with respondent.

2. Claimant has a 5% permanent functional impairment to the body as a whole as a result of her back injury.

3. Claimant has a 41% task loss and a 100% wage loss, resulting in a permanent partial general disability of 70.5%.

4. Claimant is entitled to TTD benefits from June 29, 2009, through June 23, 2010.

5. Claimant is entitled to future medical benefits upon proper application to and approval by the Director of the Division of Workers Compensation.

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[25] *Lane v. Mesler Roofing Company*, No. 242,547, 2004 WL 485715 (Kan. WCAB Feb. 26, 2004), *aff'd*, No. 91,954 unpublished Kansas Court of Appeals opinion, 111 P.3d 663, 2005 WL 1214241 (Kan. App. 2d filed May 20, 2005), *pet. for rev. dismissed*, No. 91,954, unpublished Kansas Supreme Court opinion, 129 P.3d 94, 2006 WL 538156 (Kan. filed March 1, 2006).

[26] *Id.*

[27] *Ferrell v. Day & Zimmerman, Inc.*, 223 Kan. 421, 423, 573 P.2d 1065 (1978).

[28] *Boucher v. Peerless Products, Inc.*, 21 Kan. App. 2d 977, 983, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[29] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the August 2, 2011, Award entered by ALJ Moore.

Amy R. Parker Rouse is granted compensation from Larned Healthcare Center and its insurance carrier for a March 4, 2009, accident and resulting disability. Based upon an average weekly wage of $243.52, Ms. Rouse is entitled to receive the following disability benefits:

For the period ending March 26, 2009, Ms. Rouse is entitled to receive 3.14 weeks of permanent partial general disability benefits at $162.35 per week, or $509.78, for a 5% permanent partial general disability.

For the period from March 27, 2009, through June 28, 2009, Ms. Rouse is entitled to receive 13.43 weeks of permanent partial general disability benefits at $162.35 per week, or $2,180.36, for a 70.5% permanent partial general disability.

For the period from June 29, 2009, through June 23, 2010, Ms. Rouse is entitled to receive 51.43 weeks of temporary total disability benefits at $162.35 per week, or $8,349.66.

For the period commencing June 24, 2010, Ms. Rouse is entitled to receive 250.32 weeks of permanent partial general disability benefits at $162.35 per week, or $40,639.45, for a 70.5% permanent partial general disability. The total award is $51,679.25.

As of December 1, 2011, Ms. Rouse is entitled to receive 51.43 weeks of temporary total disability compensation at $162.35 per week in the sum of $8,349.66, plus 91.71 weeks of permanent partial general disability compensation at $162.35 per week in the sum of $14,889.12, for a total due and owing of $23,238.78, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $28,440.47 shall be paid at $162.35 per week until paid or until further order of the Director.

Claimant is entitled to future medical benefits upon proper application to and approval by the Director.

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[29] K.S.A. 2010 Supp. 44-555c(k).

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John L. Carmichael, Attorney for Claimant
Terry J. Torline, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge